spurious. The financing agreement did explicitly authorize the sale of any of Raystay's assets to a third party in the ordinary course of business and for a fair consideration if the sale did not make a material change in Raystay's business. (TBF Ex. 264, p. 14.) Sandifer fully understood that such asset sales were permitted. (Tr. 5077.) Hence, no modification of the agreement would have been needed.[48/]

281. Finally, Glendale asserts that George Gardner understood he could have sought a waiver from Greyhound to allow the use of funds for LPTV construction. (Glendale PFCL I ¶¶415, 667.) However, Raystay never asked Greyhound for a waiver, and there is no evidence that Greyhound (which obviously had a reason for putting the restriction into the agreement) would have agreed to a waiver if Raystay had asked.

4. Other Defenses Raised by Glendale

282. Implicitly conceding that Raystay took essentially no steps toward construction the grant of its first extension

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48/ The financing agreement contained a special exception allowing "the assets constituting TV40" to be sold even if such sale did make a material change in Raystay's business. (TBF Ex. 264, p. 14.) The sale of TV40, an operating station, would have put Raystay out of the LPTV business and thus clearly would have made a material change in Raystay's business. On the other hand, sale of the mere unbuilt construction permits, to which no funds had been dedicated and which involved no operation and generated no revenues, would not have materially changed Raystay's business. Accordingly, there was no need for a similar exception in the financing agreement to cover the permits. Under these circumstances, Sandifer's testimony on the point (Tr. 5185) is clearly contrived.

application, Glendale asserts that Exhibit 1 as filed in July 1992 "does not make any representation that any of the activities described therein took place between December 1991 and July 1992." (Glendale PFCL I ¶395.) That argument goes nowhere. Commission policy is to judge extension applications by the progress made during the most recent construction period.[49/] In filing an extension application, therefore, an applicant is representing that the described activities occurred during the most recent construction period, unless stated otherwise. For Raystay, that representation was false.

283. Glendale further argues that a permittee may properly seek a construction permit extension for the purpose of selling the permit. (Glendale PFCL I ¶664.) However, under long-standing policy, the Commission will not grant an extension merely so the permittee may sell.[50/] Thus, if that is the permittee's motive in seeking the extension, the permittee must so disclose. To conceal such an intention is clearly deceitful, given the Commission's policy on extensions. Had Raystay

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[49/] Panavideo Broadcasting, Inc., supra, 6 FCC Rcd at 5259 (¶4); Golden Eagle Communications, Inc., supra, 6 FCC Rcd at 5129 (¶10); Metrovision, Inc., 3 FCC Rcd 598, 602 (¶23) (MMB 1988); New Dawn Broadcasting, 2 FCC Rcd 4383 (MMB 1987). The Commission will want to see "substantial and sustained progress" that is "evident from one extension period to the next." Benko Broadcasting Company, 5 FCC Rcd 1301, 1303 (¶15) (MMB 1990).

[50/] Golden Eagle Communications, Inc. 6 FCC Rcd 5127, 5129 (¶11) (1991); Rappaport Communications, Inc., 2 FCC Rcd 175 (1987); Greenfield Television, 2 FCC Rcd 4332, 4333 (MMB 1987); Continental Summit Television Corp., 27 FCC 2d 945, 948 (Rev. Bd. 1971); David E. Goff, 100 FCC 2d 1329, 1330 (MMB 1985).

candidly disclosed that it was trying to sell the permits (or more generally that it did not intend to build), the Commission certainly would have denied the extensions.[51/]

284. Next, Glendale asserts (a) that Raystay never claimed factors beyond its control as the reason for delay, and (b) that the Commission staff asked no questions. (Glendale PFCL I ¶¶400, 659-60.) The first point is irrelevant, because Raystay did not need to claim factors beyond its control. Under 47 C.F.R. §73.3534(b)(2), Raystay could get an extension by showing merely that "substantial progress has been made" toward construction. That is exactly what it sought to show with the false and misleading representations that it did make in Exhibit 1 about its pre-construction activities.

285. To be sure, the Commission staff asked no questions about those representations. If the staff had asked questions (and Raystay had responded honestly), the Commission would have learned the truth. But the staff was entitled to take Raystay's representations at face value, and because it did, Raystay got away with something. By creating the false impression of diligent ongoing pre-construction activity, Raystay twice

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51/ Glendale misplaces its reliance on Beacon Radio, Inc., 18 FCC 2d 648 (1969) (Glendale PFCL I ¶664.) There, the Commission granted an extension to allow assignment of the permit where the principal owner, whose participation in the operation was essential, had fallen ill and could not continue with the business. Under those unforeseen circumstances, which were beyond the permittee's control, the Commission approved the extension. No similar extenuating circumstances were available to Raystay in the instant case.

persuaded the staff that sufficient progress had been made to justify grant without more information. In granting the second extension, the staff expressly relied on the representation that negotiations with site owners were in progress, when in fact there were no such negotiations. (TBF Ex. 252, p. 1.) It is hardly a defense to say that the staff was fooled.

286. Indeed, this illustrates perfectly the importance of Raystay's highly misleading assertion in Exhibit 1 that "no other entity has expressed an interest in providing this service" (TBF Ex. 245, p. 4). Despite knowing that other parties had expressed interest in acquiring its LPTV permits, Raystay gratuitously included that statement for the obvious purpose of advancing a "public interest" ground to bolster its otherwise weak presentation. Raystay could reasonably expect the Commission to treat the "construction progress" showing in Exhibit 1 more leniently if the Commission believed that to deny the extensions would leave those LPTV channels lying fallow. Reinforcing the desired impression was Raystay's further observation in Exhibit 1 that it had already built TV40 pursuant to a construction permit. Together, these statements plainly implied that Raystay would build the new stations and that Raystay was the Commission's only prospect for activating this service to the public. By advancing this deceptive public interest argument, Raystay clearly was seeking to influence the staff's consideration of its deficient "construction progress"

showing, and may well have successfully averted a staff request for additional information.

5. Raystay's Misconduct Disqualifies Glendale

a. George Gardner's Unreliability

287. On the ground that Glendale is a different entity from Raystay, Glendale contends that it may not be disqualified unless George Gardner, the common principal, intended to deceive the Commission. In other words, says Glendale, misconduct by George Gardner's subordinates at Raystay cannot disqualify Glendale if he himself did not knowingly participate in their misconduct. (Glendale PFCL I ¶643.) Of course, the record thoroughly demonstrates that George Gardner did willingly and knowingly participate in Raystay's submission of false and misleading LPTV extension applications. (See ¶¶295-97 below.) That alone is dispositive. However, even if he had not known that the applications he was signing contained materially false and misleading statements concocted by his subordinates, Glendale must be disqualified for his gross unreliability as a Commission licensee.

288. In making predictive judgments about an applicant's fitness to be a licensee, the Commission is concerned not only with the applicant's propensity for truthfulness, but equally with his reliability in adhering to Commission rules and policies. Character Policy Statement, 102 FCC 2d at 1209.

Here, Raystay's submission of false and misleading representations in the LPTV extension applications plainly demonstrates that the Commission cannot rely on George Gardner.

289. The misconduct occurred when Gardner was formally under "heightened scrutiny" by the Commission for his prior misconduct in the RKO/Fort Lauderdale proceeding. He knew, therefore, that the Commission would be carefully watching him and any licensee that he controlled. And he knew, or should have known, that grave consequences could result from any significant violation or dereliction by him or any licensee that he controlled. Under those circumstances, Gardner had the greatest possible incentive to ensure total compliance by his licensee companies with all Commission requirements, especially the requirement of candor.

290. Moreover, Gardner had explicitly pledged to the Commission that with respect to applications and statements he filed, he would "carefully review any such applications and statements to ensure that they fully and accurately disclose any pertinent facts." (TBF Ex. 258, p. 3.) He made that pledge in Raystay's LPTV construction permit applications to induce the Commission to grant those permits. And the pledge was plainly instrumental in persuading the Mass Media Bureau to grant the applications. (TBF Ex. 260, p. 2.)

291. Those were the circumstances when Raystay's LPTV extension applications crossed Gardner's desk for his review and

signature. Possessing all the incentive in the world to ensure that the representations were accurate, and having explicitly pledged to the Commission (in his applications for those very permits) that he would personally verify the accuracy of such representations, Gardner did nothing but give Exhibit 1 an uncritical reading and endorse with his signature everything it said. And thus did he allow Raystay, which he controlled in every sense of the word, to secure by false pretenses not one but two six-month extensions of its LPTV permits.

292. If George Gardner let false submissions get past him under those circumstances, there are no circumstances under which the Commission can rely on him or any licensee he controls. The predictive judgment that the Commission must make about Glendale in this proceeding is a predictive judgment about George Gardner. His performance with Raystay foretells his performance with Glendale. Beyond the question of his untruthfulness, he clearly fails the test of reliability. The Commission can have no confidence that under his helm Glendale will comply with its licensee obligations any more diligently than Raystay has. And that is why Glendale must be disqualified whether or not George Gardner knowingly and willingly participated in Raystay's deceitful conduct. Other licensees have been disqualified for precisely such dereliction. Golden Broadcasting Systems, Inc., 68 FCC 2d 1099 (1978); Continental Broadcasting, Inc., 17 FCC 2d 485, 486-87 (1969); Radio Carrollton, 69 FCC 2d 1139, 1141-44 (1978); The Prattville Broadcasting Co., 4

FCC 2d 555, 563 (Rev. Bd. 1966); United Broadcasting Co. of Florida, Inc., 60 FCC 2d 816, 817 (1976).

293. Glendale is flatly wrong in contending that the Character Policy Statement does not authorize disqualification of Glendale for Raystay's misconduct absent evidence that George Gardner himself intended to deceive the Commission. (Glendale PFCL I ¶643.) To the contrary, as noted above, the Character Policy Statement expressly identifies reliability as a separate and independent character trait by which an applicant's fitness will be judged. Nothing in the Character Policy Statement prevents the Commission from considering the controlling principal's supervisory track record as to any license under his control when judging his fitness to hold the particular license being applied for. Indeed, such a limitation would defeat the very purpose of the policy, which is to deny licenses to applicants who have proved unreliable.

294. In this case, George Gardner's display of unreliability is truly aggravated and extraordinary, given the circumstances discussed above. Under the Character Policy Statement, the disqualification of Glendale is thus both authorized and warranted.

b. George Gardner's Deceitful Conduct

295. Still, this issue need not be decided on grounds of George Gardner's unreliability alone. The record clearly shows

that his conduct was deceitful. Although Exhibit 1 was prepared by others, he was fully aware of most of the undisclosed facts and circumstances that made the extension applications fundamentally deceitful. Specifically, contrary to the impression plainly conveyed by Exhibit 1 that Raystay would construct if the extensions were granted, Gardner knew at a minimum:

- that Raystay had no viable business plan;
- that Raystay had no intention of constructing the LPTV stations, because without a viable business plan "there was no way that I was going to go ahead" (Tr. 5270);
- that Raystay had allocated no money in its company budget to build the stations at any time in the future;
- that from September 1991 on, Raystay was barred by an agreement with its lender from spending money to build the stations;
- that by the fall of 1991 Raystay was actively trying to sell TV40, which it regarded as the hub of any regional LPTV system and without which the construction permits "would not have been any use to us" (Tr. 5278); and
- that Raystay wished to preserve the Lancaster and Lebanon construction permits in case a buyer of TV40 wanted them.

296. In short, Gardner knew when he signed both sets of extension applications that Raystay had no intention of constructing the stations if the applications were granted. There was no workable plan, no money, and no present intent to

construct. Although he knew these facts, he did nothing to change either the words or the tenor of what Exhibit 1 said. Instead, by signing the applications, he endorsed and sanctioned the deception. And he could not have been in any doubt about the impression being conveyed to the Commission. By the plain and ordinary meaning of the words used, Exhibit 1 clearly implied that Raystay could and would build the stations if the permits were extended. It also clearly implied that no other entity had any interest in the permits, which Gardner knew was untrue from the negotiations with prospective buyers.

297. Given the dramatic difference between the message conveyed by Exhibit 1 and the facts that George Gardner knew but did not disclose, it must be found that Gardner willingly and knowingly (a) misled the Commission about Raystay's construction intentions, (b) obscured the reasons why no construction had occurred, (c) concealed the real purpose for which Raystay was seeking the extensions, (d) and misstated the facts regarding what construction efforts had been made. He did this twice with each of four FCC broadcast construction permits. And he did it while formally on probation for his prior dishonesty in dealing with the Commission. This time he deserves no reprieve.

B. Raystay's Red Lion/York Assignment Application

1. Preliminary Statement

298. Both the Bureau and TBF agree that Raystay misrepresented facts and lacked candor in its expense certification for the Red Lion permit. (MMB PFCL ¶¶341, 348; TBF PFCL ¶724.) Only Glendale disputes this conclusion.[52/] The central premise of Glendale's argument is that no misrepresentation or lack of candor occurred because the cost figures listed in Raystay's expense certification were based upon "reasonable" allocations. However, this argument completely misses the point. The essential question is not whether Raystay's allocations were "reasonable" -- which, as discussed below, they were not -- but, rather, whether Raystay misrepresented facts and/or lacked candor by (a) failing to disclose that allocations had been made, (b) conveying the false impression that the listed expenses were Raystay's actual costs, and (c) wrongly asserting that David Gardner was familiar with the listed expenses when he was not. Try as Glendale might to divert attention from the real issues, the evidence leads to the inescapable conclusion that Raystay misrepresented facts and withheld essential information. Through its artifice, Raystay was able to induce the Commission to approve the full $10,000 sales price without

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[52/] SALAD takes no position with respect to Glendale's basic or comparative qualifications. (SALAD PFCL ¶4.)

any further scrutiny of its cost figures, thereby reaping over $5,000 in illicit profit on the sale of its Red Lion permit.

2. Raystay Lacked Candor by Failing to Disclose Its Allocations

299. On the subject of disclosure, Glendale asserts that "[t]he preponderance of the evidence shows that there was no intentional failure to state an essential fact to the Commission." (Glendale PFCL II, p. 34.) Yet Glendale cites no evidence to support that conclusion. Nor could it, because there is none. Lacking evidence, Glendale advances unsubstantiated legal arguments that range from the irrelevant to the absurd.

300. Thus, Glendale contends that Raystay met the requirements of Section 73.3597(c)(3)(ii) because it filed an itemized accounting of its alleged expenses and the Commission approved that showing without requesting additional information. (Glendale PFCL II ¶60.) This argument ignores the plain language of the rule, which required the submission of an itemized accounting "together with such factual information as the parties rely upon for the requisite showing that those expenses represent legitimate and prudent outlays made solely for the purposes allowable" under subsection (c)(2) of the rule. 47 C.F.R. §73.3597(c)(3)(ii) (emphasis added).[53/]

[53/] Subsection (c)(2) provides that the expenses must not be "in excess of the aggregate amount clearly shown to have been (continued...)

301. Raystay was therefore explicitly required to provide not only an itemized accounting of its expenses, but also whatever other "factual information" it was relying upon to justify those expenses. It is undisputed that Raystay was relying upon cost allocations to support its expense showing. Yet Raystay provided no hint, much less any "factual information," that such allocations had been made. (MMB PFCL ¶¶265, 347; TBF PFCL ¶¶429, 732.) Hence, it is no wonder that the Commission approved Raystay's itemized accounting without requesting additional information. By failing to disclose that its ostensibly precise cost figures represented a general allocation among multiple permits rather than actual costs for the Red Lion permit, Raystay gave the Commission no opportunity to consider whether the accounting was proper. To the contrary, it affirmatively misled the Commission by conveying the false impression that it was listing the actual costs for the Red Lion permit when it was not. (MMB PFCL ¶346; TBF PFCL ¶732.)

302. Accordingly, the fact that Raystay's expense showing was "routinely" approved hardly supports the conclusion that Raystay had no obligation to disclose the allocations. Instead, it underscores the fact that by withholding material information

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53/(...continued)
legitimately and prudently expended ... by the seller, solely for preparing, filing, and advocating the grant of the construction permit for the station, and for other steps reasonably necessary toward placing the station in operation." 47 C.F.R. §73.3597(c)(2) (emphasis added). (MMB PFCL ¶342; TBF PFCL ¶725.)

about the basis for its cost figures, Raystay successfully induced the Commission to approve the full $10,000 purchase price without further scrutiny of the expense accounting.

303. Equally unavailing is Glendale's claim that Raystay cannot be charged with intentionally concealing its allocations because the Commission's staff was somehow in a position to know that allocations had been made. Specifically, Glendale asserts that the staff should have been able to deduce that allocations had been used because (a) Raystay had originally filed five LPTV applications which were granted at the same time, and (b) Raystay had filed extension applications for the other four LPTV permits, which were pending when the Red Lion assignment was granted. (Glendale PFCL II ¶¶62, 65.) That argument is patently absurd. The record establishes that none of Raystay's other LPTV applications -- neither its initial applications nor its extension applications -- provided any information about Raystay's costs for Red Lion or any of the other construction permits. (TBF Exs. 203-207, 245.) Likewise, none of those applications even remotely suggested that the Red Lion expense figures -- which, again, were listed to the precise dollar -- were the product of allocation "theories" rather than a tally of actual costs. (Id.) Thus, it is utterly ridiculous to suggest that the Commission's staff should or even could have reviewed those applications and deduced from them that the Red Lion expense certification did not convey Raystay's actual costs.

304. Glendale's reliance on Superior Broadcasting of California, 94 FCC 2d 904 (Rev. Bd. 1983), is grossly misplaced. (Glendale PFCL II ¶62.) Superior held that deceptive intent cannot be inferred where the allegedly concealed information is already a matter of public record at the Commission. (TBF PFCL ¶664.) Here, the information Raystay omitted from its expense certification has never been a matter of open public record. As shown above, Raystay has never provided the Commission with any information concerning its expense allocations. Nor could this information have been deduced from the mere fact that Raystay had made other LPTV filings with the Commission. Therefore, Superior does not even remotely support Glendale's claim that Raystay acted without deceptive intent.

305. Also without merit is Glendale's argument that Raystay lacked notice that disclosure of the allocations was necessary. (Glendale PFCL II ¶¶63, 65.) Raystay had clear and unambiguous notice that disclosure of its allocations was essential. First, as explained above, Section 73.3597(c)(3)(iii) of the rules plainly indicated that Raystay's itemized accounting would have to be accompanied by whatever other "factual information" Raystay was relying upon to support its showing. That alone was sufficient to put Raystay on notice that disclosure of the allocations was required. Moreover, Morton Berfield knew from the Integrated case that disclosure was necessary. A central point of Integrated was that the applicant there had stated that it was allocating its expenses

among three applications, thereby permitting the Commission to request additional information and assess the propriety of the claim. (TBF PFCL ¶¶423, 732.) Indeed, Berfield conceded that upon reviewing Raystay's expense certification he specifically noticed the absence of any disclosure concerning Raystay's allocation, which proves that some thought was given to this subject. (Id. ¶¶429, 735.) Furthermore, he purportedly retained his initial expense calculations until Raystay's assignment application was granted, which proves that thought was given to whether the Commission might require additional information. (Id. ¶429.) Additionally, the need for disclosure was patently obvious from the very purpose of the no-profit rule, which seeks to prevent illicit gain by requiring applicants to ascertain and submit itemized expense accountings rather than merely estimate their assumed expenses. Thus, Glendale's argument that Raystay lacked notice of the need to disclose its allocations rings hollow.[54/]

306. Another fallacy is Glendale's notion that Raystay had no "rational reason" to conceal its allocations because they were done "accurately" and "honorably." (Glendale PFCL II ¶64.) To the contrary, Raystay had abundant reason to hide the allocations. First, because the no-profit rule required an

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54/ This argument is particularly ironic given that Glendale's special counsel, Mr. Bechtel, was one of the attorneys in the Integrated case who properly recognized that the applicant's use of allocations was a material fact that had to be disclosed. Integrated, 5 RR 2d at 727 (¶5) (noting that affidavits had been submitted by "Messrs. Plotkin and Bechtel").

itemized accounting of actual expenses, disclosure that the cost figures were estimates based on allocations would likely have engendered Commission scrutiny of Raystay's expense showing. Indeed, Berfield must have known from the Integrated case -- because it was clear from the face of the decision itself -- that the applicant's disclosure of its allocations in that case had prompted questions concerning the propriety of its accounting. Here, any such review would have compelled Raystay to demonstrate that its claimed expenses had been incurred solely for preparing, filing, and advocating the grant of the Red Lion application, and for other steps reasonably necessary toward placing that station in operation. 47 C.F.R. §73.3597(c)(2). This, Raystay knew, it could not do.

307. For instance, to make such a showing Raystay would have been required to establish that 50% of its total legal fees for all five LPTV permits were specifically attributable to Red Lion. Yet Berfield knew from reviewing his legal invoices that Raystay's legal fees for all five LPTV permits had been billed in the aggregate, thereby making it virtually impossible to attribute any of those fees specifically to the Red Lion permit. (MMB PFCL ¶346; TBF PFCL ¶¶410-12, 730.) Moreover, Raystay would have been required to demonstrate that those fees were legitimate and prudent outlays made solely for the purposes allowed under the no-profit rule, which, as shown, was not the case. Additionally, to establish its right to the full $10,000 sales price, Raystay would have had to demonstrate that one-

third of Hoover's engineering fees for all five LPTV permits were specifically attributable to the Red Lion permit, when Hoover's invoice of March 31, 1989, quite plainly showed they were not. (MMB PFCL ¶¶262, 346; TBF PFCL ¶¶418-20.)

308. Thus, Raystay's motive for concealing its use of the allocations is clear. At best, under Berfield's understanding of the Review Board's ruling in the Integrated case, Raystay would have been compelled to allocate Raystay's legal expenses on a pro rata basis by one-fifth rather than one-third. (MMB PFCL ¶¶260, 345; TBF PFCL ¶731.) Using the total legal fees of $15,397.03 set forth in Berfield's letter of November 7, 1991, this would have produced legal expenses for the Red Lion permit of $3,079.41, rather than the $7,698 set forth in Raystay's expense certification. (TBF PFCL ¶421.) If, on the other hand, Integrated is read to require documentation of actual expenses, Raystay would have been compelled to show that its claimed legal fees had been incurred specifically in connection with the Red Lion permit, which Berfield knew from his review of Raystay's legal invoices it could not do. (Id. ¶730.) Additionally, Raystay could not have used any allocation at all with regard to its engineering fees because it had Hoover's March 31 invoice which detailed the Red Lion charges. (MMB PFCL ¶¶264, 347; TBF PFCL ¶730.) Thus, Raystay would have been forced to specify engineering expenses of $1,350, which Berfield has acknowledged was the appropriate charge as reflected on the face of Hoover's invoice. (TBF PFCL ¶416.)

309. Accordingly, whichever way Integrated is read, it is clear that if Raystay had been forced to justify its allocations, it could not have proved costs sufficient to support the full $10,000 that it wanted for the permit. (Id. ¶421.) So, instead, it disregarded both the Integrated case and Hoover's March 31 invoice, conjured up two allocation "theories" of its own design, modified its contract with Grolman to provide that it could terminate the deal if the full $10,000 sale price was not approved, and submitted a false expense certification which conveyed specific dollar amounts in the hope that the Commission would "routinely" approve its expense accounting without further inquiry, which is precisely what happened.

3. Raystay Also Misrepresented Facts

310. Glendale argues that Raystay did not misrepresent its cost figures because they were derived through allocations that were "accurate and reasonable." (Glendale PFCL II ¶44.) Thus, Glendale concludes, those figures did not portray a "false fact." (Id. ¶¶46-47, 51, 56-58.) This argument ignores substantial evidence which, as discussed at ¶¶313-24 below, plainly establishes that the allocations were neither "accurate" nor "reasonable." It also overlooks the critical point that the expense certification represented that the listed costs had been "incurred by Raystay in obtaining the construction permit being assigned," when in reality they had not. (TBF PFCL ¶388.) This was a "false fact."

311. In truth, the record establishes that the legal and engineering fees listed in the expense certification did not reflect Raystay's actual costs in obtaining the Red Lion permit. Rather, they were merely estimates that had been created through the use of allocation "theories" that had no basis in law or fact. (MMB PFCL ¶346; TBF PFCL ¶732.) Both David Gardner and Sandifer knew when the assignment application was filed that the expense certification did not reflect Raystay's actual costs. (MMB PFCL ¶347; TBF PFCL ¶¶734-35.) Likewise, Berfield knew when he reviewed the expense certification that the legal and engineering figures were based upon allocations. (TBF PFCL ¶735.) Moreover, he knew or should have known from reading the Integrated case that such allocations were either prohibited or, at best, permitted only when made on a pro rata basis. (MMB PFCL ¶¶344-46; TBF PFCL ¶731.) Nevertheless, Raystay's certification that the costs had been incurred specifically in connection with the Red Lion permit was advanced without correction. This was a deceptive act.

312. Glendale's argument also disregards the fact that Raystay represented to the Commission that David Gardner was familiar with the listed expenses when, in truth, he was not. (TBF PFCL ¶¶426, 729.) This too was a false fact. The record establishes that David Gardner had initially tried to assemble cost figures in connection with all five of Raystay's construction permits in the aggregate. (Id. ¶¶392-93.) Moreover, prior to certification he reviewed Berfield's letter of November 7,

1991, which purported to list Raystay's aggregate expenses for all five LPTV permits, as well as Hoover's March 31, 1989 invoice, which itemized Hoover's fees on a per application basis. (Id. ¶419.) However, the record firmly establishes that when David Gardner executed Raystay's expense certification, he was not familiar with the cost figures for which Raystay was seeking reimbursement. (Id. ¶¶426, 729.) Nonetheless, Raystay filed this false statement and left it on file without correction, thereby conveying the fraudulent impression that Raystay's costs for the Red Lion permit were known to David Gardner and could be verified by him upon request. This was a deceptive act.

4. Raystay's Allocations Were Neither "Accurate" Nor "Reasonable"

313. Glendale urges that Raystay did not misrepresent facts because the legal and engineering figures set forth in the Red Lion certification were "accurate and reasonable." (Glendale PFCL II ¶44.) With regard to legal fees, Glendale asserts that Berfield's calculation of Raystay's total legal fees of $15,397 for all five LPTV permits, which served as the predicate for his subsequent 50% allocation to the Red Lion permit, is supported by (a) invoices covering this amount and (b) Berfield's testimony concerning how he calculated that figure. (Id. ¶46.) Thus, Glendale submits that --

> "the preponderance of the evidence supports the accuracy of the figure in the amount of $15,397 as legal costs legitimately and prudently expended solely

for preparing, filing and advocating the grant of the five low power television construction permits and for other steps reasonably necessary toward placing the proposed stations in operation." (Id.)

314. However, that argument is thoroughly discredited by evidence which establishes that Berfield included in his calculation of Raystay's total legal fees charges for legal work that had nothing whatsoever to do with any of Raystay's unbuilt LPTV construction permits. Specifically, the record shows that Berfield included fees for reviewing documents sent by Ms. Bishop, TV40's station manager, concerning the **Dillsburg** LPTV station, filing LPTV network affiliation agreements with the Commission, discussions with Commission staff and Ms. Bishop concerning LPTV station records, and the preparation of a letter to Ms. Bishop concerning station records. (Glendale Ex. 224, pp. 15, 19; TBF Ex. 292, pp. 6, 9; Tr. 5494-96.) George Gardner admitted under cross examination that Ms. Bishop had no responsibility with regard to the construction or operation of Raystay's unbuilt LPTV construction permits. (Tr. 5636-38.) Likewise, he confessed that Raystay to his knowledge was never a party to any affiliation agreements concerning the unbuilt construction permits. (Tr. 5635-36.) Thus, the preponderance of the evidence hardly supports Glendale's claim that Berfield's calculation of Raystay's total LPTV legal fees was accurate. To the contrary, the evidence establishes that he created a figure that -- like the Red Lion certification -- overstated Raystay's expenses.

315. Additionally, the record raises serious questions about the credibility of Berfield's testimony concerning how he arrived at the $15,397 figure set forth in his letter of November 7. For example, Glendale asserts that Berfield calculated this figure by reviewing legal invoices and attorney time records which were generated during the period March 1988 through November 1991, and by consulting with Cohen concerning invoices that Cohen had prepared. (Glendale PFCL II ¶¶11(a), 67, 69.) Glendale contends that through this process Berfield was able to make the precise calculations necessary to determine what amounts should be allocated to Raystay's LPTV construction permits despite the fact that its legal invoices included charges for both LPTV and non-LPTV related matters. (Id. ¶¶11(a), 69.)

316. However, that sort of detailed calculation would have been virtually impossible given Cohen & Berfield's billing practices at the time. Specifically, the record shows that Raystay was not charged a consistent hourly rate for legal services rendered by Cohen or Berfield or their associates John Schauble or Roy Boyce during the period 1989 to 1992. Rather, Raystay was charged a base rate of $200 per hour for the time of those attorneys, which was adjusted either upwards or downwards depending upon the uniqueness of the services rendered and their value to the client. (Tr. 5647-48, 5651-5653.) Cohen explained that these adjustments were made on an ad hoc basis, typically when the bills were prepared. (Tr. 5651-52.) At that time an

assessment would be made of what services had been rendered and a value would be added to the firm's base rate of $200 per hour. (Tr. 5651-52.) The record also establishes that neither Berfield nor Cohen retained their personal time records for any extended period of time. (Tr. 5437-38.) In this regard, Berfield testified that his practice was to discard such records after the bill reflecting his services were paid (Tr. 5438), and Cohen explained that he retained them only for a short time, not more than a year. (Tr. 5652.) Thus, Berfield conceded that when he made his alleged calculations, he reviewed no billing records showing the charges of Schauble or Boyce other than the invoices and time diaries produced in this proceeding. (Tr. 5436-37, 5441-42.) Similarly, he did not review any time records for himself or Cohen when he made those calculations, except, perhaps, for a list associated with one or two bills that were generated within five or six months of his November 7 letter. (Tr. 5438-39.) With regard to such billing records, Berfield acknowledged that "I certainly didn't have anything that reached back to the early stages of the project." (Id.)

317. Accordingly, for Berfield to have made the precise calculations that he claims were made to arrive at the $15,397 figure for legal fees reflected in his letter of November 7, it would have been necessary for him and Cohen to have recalled exactly how much Raystay had been charged for each LPTV matter reflected in the invoices they had generated during the preced-

ing two and one half years.[55/] This information was not apparent from the face of Raystay's legal invoices because the services reflected in those invoices were billed in the aggregate. Similarly, reference to the attorney time records for Boyce or Schauble would not have yielded this information because their billing rates, like those of Berfield and Cohen, varied from project to project on an ad hoc basis. Accordingly, Berfield's claim that he was able to use those time records years after the fact to ascertain Raystay's total legal fees for its LPTV construction permits is, at best, implausible and, at worst, a complete contrivance.

318. Similarly, the $7,698 for legal fees set forth in the Red Lion expense certification was not "accurate." First, since it was derived from an inflated sum to begin with, it was flawed from its inception. Moreover, as Glendale admits, virtually none of the charges set forth in Raystay's various legal invoices are capable of being tied specifically to Red Lion or any of the other permits. (Glendale PFCL II ¶49; TBF PFCL ¶¶410, 730.)[56/] Thus, there is no way that the figure accur-

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[55/] Similarly, in order to prepare the "reconstructed" tabulation that he claims to have made in preparation for this proceeding (Glendale Ex. 224, pp. 2-3, 15), it would have been necessary for Cohen and Berfield to have recalled specific billing amounts reaching back over the preceding five years. Yet, incredibly, Berfield claims to have arrived at the precise figures reflected in that tabulation on his first attempt, without making any revisions or corrections. (Tr. 5446.)

[56/] Glendale incorrectly asserts that $4,000 was the "quoted fee" for Berfield's initial preparation of the Red Lion applica-
(continued...)